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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re G.B. et al., Persons Coming Under the  
Juvenile Court Law.

B241634  
(Los Angeles County  
Super. Ct. No. CK91316)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

GARY S.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County.

D. Zeke Zeidler, Judge. Affirmed in part; reversed in part.

Cristina Gabrielidis Lechman, under appointment by the Court of Appeal,  
for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel,  
Emery El Habiby Deputy County Counsel, for Plaintiff and Respondent.

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Gary S. (Father) appeals from orders of the juvenile court finding Father's children, G. and Manny B., to be dependent children of the court under Welfare and Institutions Code section 300, subdivisions (a), (b), (d), and (j) and removing them from Father's custody.<sup>1</sup> We conclude that the evidence as to Father supports jurisdiction over both children under subdivision (b) and over G. under subdivision (d). The evidence does not support jurisdiction over Manny under subdivisions (d) or (j) nor does it support his removal from Father's custody.

### **FACTS AND PROCEEDINGS BELOW**

The family in this case consists of Father, Maria B. (Mother), G. and her half-brother Manny. When these proceedings commenced in January 2012 G. was age nine and Manny was age seven.<sup>2</sup> The family came to the attention of the Department of Children and Family Services (DCFS) in December 2011, when Mother and Father got into an argument in a public parking lot and Mother punched Father several times and then started chasing him with a wrench. Frightened, the children went into a store and a clerk called the Los Angeles County Sheriff's Department.

When sheriff's deputies arrived at the scene, G. and Manny told them that Mother punched Father three times with her fist and that they fought almost every time they met. The deputies arrested Mother for domestic violence and arrested both parents for child endangerment based on their constant arguing and physical violence toward one another in front of the children. G. also told the deputies that a few days earlier when she was sleeping at Father's house in the same bed with Father he touched her vaginal area through her clothes. The sheriff's department referred the matter to the DCFS.

G. told the DCFS worker that Mother and Father fought all the time and that on the same day as the fight in the parking lot Father had hit Mother and threw a bicycle at her. As to sexual abuse, G. said that Father "touches her in her private parts" and that

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Manny is Father's biological son. Father has raised G. as his daughter since she was an infant. Mother and Father separated in 2005.

nine or ten times she has felt a “hairy hand” on her vaginal area. The touching was always over her clothes. Later she told a DCFS worker that Father’s touchings happened about four times—twice when she was eight years old and twice when she was nine years old. These touchings happened when she was in bed with Father at his home and Manny was in the bathroom. The evidence showed that Father lived in a house with male roommates. Father had his own bedroom with a lock on the door.

When G. testified at the jurisdictional hearing she told the court that she had “not really” seen her father touch her vaginal area. She also said she did not remember saying Father touched her vaginal area and that she thought maybe she dreamed it. She did say that once she felt a hand on her body but could not remember where and she never saw who the hand belonged to. Asked if she ever told a DCFS worker that while staying at Father’s house she “felt a hairy hand” on her vaginal area, G. quipped: “Well, all the guys there have hairy hands except for my brother.” G. then answered that she did not remember telling a DCFS worker that she felt a “hairy hand” on her vaginal area.

At the jurisdictional hearing, Manny said he saw Father and Mother hit each other one or two times. Most of the time they just argued and called each other “bad names.” Manny estimated that he had seen them do this about 70 times. He denied being physically or sexually abused by either parent. G. confirmed Manny’s testimony about her parents’ fighting. When these fights occurred G. and Manny would run and hide.

When the DCFS interviewed Father he admitted fighting with Mother and claimed that she was usually the aggressor. He called the allegations that he sexually abused G. “absolutely untrue” and stated that Mother put G. up to making these accusations.

The court sustained the petition under Welfare and Institutions Code section 300, subdivision (a) on the basis of domestic violence between Father and Mother, under subdivision (b) on the basis of domestic violence and Father’s sexual abuse of G., and under subdivisions (d) and (j) based on Father’s sexual abuse of G.

At the disposition hearing the court removed the children from the custody of Father and Mother. The court placed G. with her maternal grandmother and placed Manny with his paternal grandmother. Father was ordered to attend various counseling programs and was awarded monitored visits with both children.

Father filed a timely appeal from the court's jurisdictional and dispositional orders. Mother is not a party to this appeal.

## **DISCUSSION**

### **I. THE EVIDENCE OF DOMESTIC VIOLENCE SUPPORTS A FINDING OF JURISDICTION OVER G. AND MANNY UNDER SECTION 300, SUBDIVISION (b).<sup>3</sup>**

The court found jurisdiction over the children under section 300, subdivisions (a) and (b). We affirm as to subdivision (b) but reverse as to subdivision (a).

Jurisdiction under section 300, subdivision (a) requires proof that the child suffered or is at substantial risk of suffering "serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian."

There was no evidence that Father ever intentionally physically harmed either of the children or that the children were at risk of intentional physical harm from him. On the contrary, G. testified that when a fight broke out between Father and Mother she and Manny would run and hide in the bathroom or in their bedroom. In the incident that triggered this petition the children ran inside a store.

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<sup>3</sup> The DCFS contends that we need not consider Father's challenge to the jurisdictional findings as they relate to him because, even if his challenge is successful, G. and Manny would remain dependents of the court based on the unchallenged findings against Mother. Erroneous jurisdictional findings as to Father, however, could affect him adversely in the future if dependency proceedings were again initiated or even contemplated with regard to Manny or with regard to Father's future children, if any. (*In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763.) "Moreover, refusal to address such jurisdictional errors on appeal . . . has the undesirable result of insulating erroneous or arbitrary rulings from review." (*In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1548.) For these reasons we will address Father's appeal from the jurisdictional finding as to him.

Jurisdiction under section 300, subdivision (b), on the other hand, requires proof that the child suffered or is at substantial risk of suffering “serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child. . . .”

Physical violence between a child’s parents may support the exercise of jurisdiction under subdivision (b) if there is evidence that the violence is ongoing or likely to continue *and* that it directly harmed the child physically or placed the child at risk of physical harm. (*In re Daisy H.* (2011) 192 Cal.App.4th 713, 717.) Here, the statements by the children and Father’s and Mother’s own admissions showed that the physical violence between the parents was ongoing and likely to continue. The children’s statements that they ran and hid whenever Father and Mother began to fight suggests that the children believed that they were at risk of physical harm in those altercations.

## **II. THE EVIDENCE AS TO FATHER SUPPORTS A FINDING OF JURISDICTION OVER G. UNDER SECTION 300 SUBDIVISION (d).**

Jurisdiction under section 300, subdivision (d) requires proof by a preponderance of the evidence (§ 355, subd. (a)) that “[t]he child has been sexually abused . . . by his or her parent or guardian or a member of his or her household.”

We summarized the evidence supporting subdivision (d) jurisdiction over G. at page 3, above. We find the evidence was sufficient to declare G. a dependent child of the court under section 300, subdivision (d).

## **III. THE EVIDENCE AS TO FATHER DOES NOT SUPPORT A FINDING OF JURISDICTION OVER MANNY UNDER SECTION 300, SUBDIVISIONS (d) OR (j).**

Section 300, subdivision (d) states in relevant part that jurisdiction over a child arises when “[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by his or her parent . . . or a member of his or her household, or the parent . . . has failed to adequately protect the child from sexual abuse when the parent . . . knew or reasonably should have known that the child was in

danger of sexual abuse.” Section 300, subdivision (j) provides that jurisdiction over a child arises when “[t]he child’s sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), and there is a substantial risk that the child will be abused or neglected, as defined in those subdivisions.”

The court justified taking jurisdiction over Manny under subdivisions (d) and (j) on two grounds: “There’s prepubescent and him approaching the same age [G.] is, and there’s him being in the room when this [molestation] is happening in the same bed which is exactly the fact pattern of *In re Andy G.*”

No court has cited any scientific authority or empirical evidence to support the conclusion that a person who sexually abuses a female child is likely to sexually abuse a male child. To the contrary, the few studies that we have been able to locate show that in cases of a father’s incest with a daughter, in the absence of other indicators of risk, “the male child is not likely to be victimized.” (Wilson, *The Cradle of Abuse: Evaluating The Danger Posed By A Sexually Predatory Parent To The Victim’s Siblings* (2002) 51 Emory L.J. 241, 263-264.)

Studies further show that where a female child is the initial victim of abuse, the abuser likely will prey upon other female children in the household, while leaving the male children alone. (Wilson, *supra*, at p. 287.) A study published in the Journal of Child Sexual Abuse found that in 157 cases of sexual abuse within a family, 135 of the male perpetrators abused only female children (86%), 13 abused only male children (8.3%) and nine victimized both male and female victims (5.7%). (Proeve, *A Preliminary Examination of Specific Risk Assessment for Sexual Offenders Against Children* (2009) vol. 18, issue 6, Journal of Child Sexual Abuse 583, 585; hereafter Proeve.) “Other indicators of risk” may include the sexual proclivity of the molester. Is he an indiscriminately promiscuous adult; a pedophile; a pure incest offender? (Cavallin, *Incestuous Fathers: A Clinical Report* (1966) vol. 122, No. 10, American Journal of Psychiatry 122, 1132-1138.) Has he molested unrelated boys? (Wilson, *Recognizing The Threat Posed by an Incestuous Parent to the Victim’s Siblings:*

*Part I: Appraising the Risk* (June 2004) vol. 13, No. 2, Journal of Child and Family Studies 143, 153.) One study found that the father's age when he abuses the minor female and his own sexual abuse as a minor affected the probability that the father would cross the gender boundary. (Proeve, *supra*, at p. 586.)

As to the court's comment regarding the children's age and sexual development, we agree that the comparative sexual development of the molested female and her male sibling *may* be a factor affecting the male's risk of molestation. (See § 300, subd. (j), quoted at p. 6, *ante*.) No evidence of these risk factors was introduced in this case and no expert witness testified in support of the required "substantial risk."

Contrary to the trial court's comment, the facts in this case are not akin to those of *In re Andy G.* (2010) 183 Cal.App.4th 1405. In that case a father was found to have sexually abused his son's 12- and 14 year-old half-sisters by fondling their genitals, showing them pornographic movies and masturbating in their presence. On one occasion, the father asked one of the girls to take her two-year-old half-brother to the store and, when the daughter reached to take the child, father exposed his penis to her. Division Eight of this court held that the father's "aberrant sexual behavior" and his "total lack of concern" that his son might observe that behavior and thus be directly victimized, put the boy at substantial risk of sexual abuse under section 300, subdivisions (d) and (j). (*Id.* at pp. 1414-1415.) In contrast, here, no evidence showed that Manny witnessed any abuse of G. or that any abuse occurred in his presence. G. testified Manny was asleep or in the bathroom when Father rubbed her vagina over her clothes and Manny testified Father did not molest G.

#### **IV. THE DISPOSITIONAL ORDER IS REVERSED AS TO MANNY.**

Absent evidence that Father posed a serious risk of harm to Manny, his past behavior with G. does not justify detaining Manny from Father and restricting Father to monitored visitation with his son.

Under the heightened standard of review applicable to dispositional orders (*In re Alexis S.* (2012) 205 Cal.App.4th 48, 53-54, 55), we conclude that the portion of the dispositional order removing Manny from Father's legal custody and restricting Father to monitored visitation is not necessary to protect Manny because the court can make orders to avoid the risks of harm to Manny without depriving Manny of the benefits of being with his father. Father and Mother are living separately and under court order not to visit the children together. The court can further reduce the risk that Manny will be exposed to physical harm from domestic violence by ordering that Mother's visits with Manny take place outside Father's home, that they be monitored and that Father not be the monitor.

#### **DISPOSITION**

The jurisdictional order as to Manny is affirmed under section 300, subdivision (b) and reversed under subdivisions (a), (d) and (j). The dispositional order as to Manny is reversed. The jurisdictional order as to G. is affirmed under subdivisions (b) and (d) and reversed under subdivisions (a) and (j). The dispositional order as to G. is affirmed.

NOT TO BE PUBLISHED.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.

JOHNSON, J.